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No. 03-265

Supreme Court, U.S.
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In The
Supreme Court of the United States

TERESA AND LARRY FRAKES,

Petitioners,

v.

PRECISION TUNE AUTO CARE, INC., GRIMAUD ENTERPRISES, INC., JOHN GARIES, and WILLIAM GRIMAUD,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Alabama

BRIEF IN OPPOSITION FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the denial of the Frakes' petition for writ of certiorari to the Supreme Court of Alabama constitutes a decision subject to this Court's certiorari review?

2. Whether the Virginia court possessed personal jurisdiction over the parties to this action?

3. Whether the enforcement of the forum selection clause complied with this Court's decision in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972)?

4. Whether this Court should reverse its decision in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972) and adopt a presumption that forum selection clauses are *per se* invalid as suggested by Petitioners?

5. Whether Precision Tune, Inc., Grimaud Enterprises, Inc., John A. Garies, Jr. and William Grimaud timely raised their venue-related objections?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondents respectfully submit this Corporate Disclosure Statement.

Respondent Precision Tune, Inc. which is now known as Precision Tune Auto Care, Inc. is a subsidiary of WE JAC Corporation. WE JAC Corporation is a subsidiary of Precision Auto Care, Inc., which is publicly traded on NASD over-the-counter market.

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BRIEF IN OPPOSITION FOR RESPONDENTS

Respondents Precision Tune Auto Care, Inc. (hereinafter "Precision Tune"), Grimaud Enterprises, Inc. (hereinafter "Grimaud Enterprises"), John A. Garies, Jr. (hereinafter "Garies") and William Grimaud (hereinafter "Grimaud") respectfully submit that the Petition for Writ of Certiorari (hereinafter "Pet.") filed by Petitioners is due to be denied.

JURISDICTION

As discussed in greater detail herein below, the May 23, 2003, opinion of the Alabama Supreme Court does not constitute a reviewable decision under 28 U.S.C. §1257 and, therefore, the Petition for Writ of Certiorari filed by Petitioners is due to be denied.

STATEMENT OF THE CASE

In early- to mid-1994, Petitioner Larry Frakes initiated communications with Precision Tune regarding the possibility of opening a Precision Tune automotive service center in North Alabama.[1] Respondent Precision Tune[2] is a Virginia corporation with its principal place of business in Leesburg, Loudoun County, Virginia and is in the business

[1] The statement in the Frakes' Petition that they were "recruited" by Precision Tune is both misleading and inaccurate because the Frakes initiated contact with Precision Tune and actively pursued the opportunity to open a Precision Tune automotive service center. (Pet. at 10)

[2] "Precision Tune Auto Care, Inc." was formerly known as "Precision Tune, Inc."

of franchising "automotive service businesses." Soon after initiating contact with Precision Tune, Mr. Frakes attended two (2) seminars held by Precision Tune regarding franchising opportunities. According to Mr. Frakes, the first substantive contact with Precision Tune occurred when he attended a franchising seminar offered in Houston, Texas ("Texas seminar"), where representatives of Respondent Grimaud Enterprises, an area subfranchisor of Precision Tune, made a presentation regarding franchising opportunities. One presenter at the Texas seminar was Respondent John A. Garies, Jr.

Shortly after the Texas seminar, Mr. Frakes attended a second seminar at Precision Tune's corporate headquarters in Leesburg, Virginia ("Virginia seminar"), where he reached his final decision to enter into the franchisor-franchisee relationship with Precision Tune. Mr. Frakes recalled that the presentations at the Texas seminar and the Virginia seminar were not "substantially different." The Frakes concede that Mr. Frakes executed the Franchise Agreement at the Virginia seminar in Leesburg, Virginia on November 30, 1994. In the Franchise Agreement, Mr. Frakes acknowledged that Precision Tune's principal place of business constituted Leesburg, Virginia, and specifically agreed in the Franchise Agreement:

> This Agreement takes effect upon its acceptance and execution by [Mr. Frakes] in Virginia and shall be interpreted and construed under the laws thereof, which laws shall prevail in the event of any conflict of law . . .
>
> . . . *The parties agree that any action brought by either party against the other in any court, whether federal or state, shall be brought within the Commonwealth of Virginia in the judicial*

> *district in which [Precision Tune] has its principal place of business and do hereby waive all questions of personal jurisdiction or venue for the purpose of carrying out this provision.*

(Italics supplied) During the five (5) business days prior to the execution of the Franchise Agreement, Mr. Frakes reviewed the Agreement and consulted with his legal counsel who reviewed it with him.

After the Precision Tune automotive center established by the Frakes in Athens, Alabama failed to yield the financial return desired by the Frakes, they initiated this action in the Circuit Court for Madison County, Alabama (hereinafter the "trial court"), on November 14, 1997, asserting claims on behalf of both of them for breach of contract (based on the Franchise Agreement), fraud, civil conspiracy and a claim under the Alabama Deceptive Trade Practices Act, *Ala. Code* § 8-19-15 (1975). The defendants named in the original Complaint were: Precision Tune (a Virginia corporation), Grimaud Enterprises (a South Carolina corporation) and Grimaud (a resident of Madison County, Alabama). Garies (a resident of South Carolina) was subsequently added as a defendant.

The claims asserted in the Frakes' Complaint and subsequent amended pleadings allegedly arose out of two separate nucleuses of fact: (1) the alleged breach of the Franchise Agreement, and (2) alleged misrepresentations made to the Frakes principally during the course of the Texas and Virginia seminars.

At the outset of this action, each of the Respondents filed separate Motions to Dismiss, asserting various valid and substantiated bases for the dismissal of the Frakes' claims. Despite requests from Respondents to do so, the

trial court did not rule on these Motions to Dismiss and Respondents were forced to participate in limited discovery.[3]

On June 19, 1998, the Frakes' out-of-state counsel (who was, at the Frakes' direction, acting as "lead counsel"[4]) filed his application to appear *pro hac vice*. This application revealed a disciplinary proceeding which was pending against him before the Oregon Supreme Court. At the Frakes' request, the trial court postponed its decision regarding the *pro hac vice* admission of Frakes' out-of-state lead counsel pending final determination by the Oregon Supreme Court. As courtesy to the Frakes and their out-of-state counsel, Respondents agreed to the placement of this case on inactive status pending resolution of counsel's disciplinary proceedings. On September 14, 2000, the Oregon Supreme Court filed its opinion suspending Frakes' then out-of-state counsel "from the practice of law for 13 months." *In re Conduct of Brandt*, 10 P.3d 906 (Or. 2000). Sometime thereafter, this decision was brought to the trial court's attention, and on November 17, 2000, the trial court denied the application.

The trial court placed this case on the administrative docket on January 17, 2001, and ordered the parties to mediation. The Frakes delayed until May 1, 2001, before

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[3] Unlike the *Federal Rules of Civil Procedure*, a party is not excused under the *Alabama Rules of Civil Procedure* from responding to written discovery and deposition notices during the pendency of a motion to dismiss under Rule 12 of the *Alabama Rules of Civil Procedure*.

[4] Out-of-state counsel have always been designated to defendants as "lead counsel."

obtaining another out-of-state attorney to act as "lead counsel," thus forcing the case into an "inactive" status from June 19, 1998, until May 1, 2001. After this case was removed from the administrative docket, Precision Tune filed its Second Amended Motion to Dismiss (the original motions had not been ruled upon), requesting that the Court enforce the valid forum selection clause contained in the Franchise Agreement between Mr. Frakes and Precision Tune and require that this matter be dismissed and/or transferred to the mutually agreed upon forum of Virginia. After Precision Tune moved to dismiss this action on the basis of the forum selection clause, Grimaud Enterprises, Grimaud and Garies filed their Second Amended Motion to Dismiss, asserting that, pursuant to the doctrine of *forum non conveniens*, Virginia constituted the most convenient forum in which the parties should litigate this action.

At the Frakes' request, the first hearing on the pending motions to dismiss was postponed approximately two (2) months. The day before the second scheduled hearing, the Frakes filed a response to Respondents' pending motions, but **the Frakes never submitted any evidence in opposition to Respondents' motions prior to this hearing.** After this second hearing, the trial court entered an order enforcing the forum selection clause in the Franchise Agreement as to Precision Tune and dismissing *without prejudice* the Frakes' claims against Grimaud Enterprises, Grimaud and Garies on the basis of *forum non conveniens*. The trial court's dismissal of this action was conditioned upon Respondents' waiver of any objections as to venue, jurisdiction and statute of limitations for a period of one hundred twenty (120) days, which was agreed to by Respondents.

The Frakes appealed the trial court's dismissal of this action to the Alabama Court of Civil Appeals. After the parties submitted their respective briefs to the Alabama Court of Civil Appeals, on February 14, 2003, the Court of Civil Appeals affirmed without opinion the decision of the trial court. The Frakes then filed a petition for writ of certiorari and supporting brief to the Alabama Supreme Court pursuant to Rule 39 of the *Alabama Rules of Appellate Procedure*. Soon thereafter, the Frakes were notified that their Petition and brief failed to comply with the form requirements set forth in *Alabama Rule of Appellate Procedure* 39 and were provided with an opportunity to submit conforming documents. Seizing upon what they perceived to be an opportunity to revise and expand their petition and brief, the Frakes submitted a revised petition and brief which included additional substantive arguments not contained within their original petition and brief. The addition of these substantive arguments was in direct violation of Rule 32(c) of the *Alabama Rules of Appellate Procedure*, which allows for the submission of a conforming document so long as the party submitting the conforming document "in no event . . . add[s] any substantive material" to the argument asserted therein.

In response to this violation of Rule 32(c) of the *Alabama Rules of Appellate Procedure*, Respondents moved to dismiss the Frakes' petition and brief. On May 16, 2003, the Alabama Supreme Court released its decision in this case, concluding:

> The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied **for noncompliance with Rule 39(d)(3), Alabama Rules of Appellate Procedure.**

(Emphasis supplied) The Frakes now request this Court to exercise its discretionary certiorari jurisdiction to review the propriety of the Alabama Supreme Court's decision, even though it did not address the merits of the Frakes' contentions due to their failure to comply with Alabama's appellate rules.

SUMMARY OF REASONS FOR DENYING THE WRIT

Though the Frakes' Petition is replete with allegations of error by the trial court, the Alabama Court of Civil Appeals and the Alabama Supreme Court, it is devoid of any legal authority or evidence which supports any of the alleged errors identified by the Frakes. Pursuant to 28 U.S.C. § 1257, the statutory basis for this Court's certiorari jurisdiction, the Frakes' Petition is due to be denied because it fails to raise a substantial federal question which is necessary to the resolution of this case, and which would warrant the Court exercising its discretion in this regard. The Alabama Supreme Court affirmed the decision of the lower courts based not upon the merits of this case, but *solely* upon the Frakes' failure to comply with the *Alabama Rules of Appellate Procedure*. Therefore, the issues which Petitioner seeks to have this Court address were not necessary to affirm the decisions below.

Even if the Frakes had complied with these procedural rules, the alleged decision by the Alabama Supreme Court provides no basis for this Court to grant certiorari. The liberties which Petitioners take with the record below in presenting and arguing their Petition are extraordinary. Petitioners failed to introduce any evidence at the trial court level to support their positions and alleged

"facts" now argued on appeal, as specifically found by the trial court in its Amended Order of Dismissal, and affirmed by the Alabama Court of Appeals. In their Petition, the Frakes state that "[v]enue determinations are necessarily fact-specific." (Pet. at 13) Yet, they made no factual record before the trial court to support their position.

Further, Petitioners' jurisdictional and venue arguments lack merit. Larry Frakes agreed to submit to the jurisdiction of the Virginia courts (Precision Tune's principal place of business) by virtue of a valid and enforceable forum selection clause, which was both fair and reasonable under the standards dictated by this Court in *M/S Bremen*. Mrs. Frakes sought recovery for breach of the Franchise Agreement, even though she was not a signatory to it. She may not claim its benefits without submitting to its requirements. Furthermore, she may voluntarily submit to the jurisdiction of the courts in Virginia by initiating a suit there. All remaining Respondents other than Precision Tune were dismissed based upon the doctrine of *forum non conveniens*, and voluntarily consented to the jurisdiction of the Virginia courts. Petitioners do not directly challenge the trial court's *forum non conveniens* ruling (the words *forum non conveniens* do not even appear in their Petition). Rather, they argue incorrectly that no jurisdiction can be obtained in Virginia over these defendants. The voluntary consent to jurisdiction in Virginia by the defendants was effective to confer jurisdiction upon the Virginia court. To achieve their purposes, Petitioners invite this Court to undertake a radical reinterpretation of *M/S Bremen* and its progeny to hold that forum selection clauses in all franchise agreements and any agreement that might be involved in a "consumer protection case" be held to be presumptively invalid. The impact of such a

change would be enormous, and should be rejected. Finally, because the venue-related objections of Respondents were asserted in their first responsive pleading in compliance with Ala. R. Civ. Proc. 12(h), these objections were timely and properly granted. Accordingly, the Petition for Writ of Certiorari is due to be denied.

REASONS FOR DENYING THE WRIT

I. The Alabama Supreme Court did not render a decision on the merits of the Frakes' Petition for Writ of Certiorari.

In attempting to challenge the affirming decision of the Alabama Court of Civil Appeals, the Frakes filed a Petition for Writ of Certiorari with the Alabama Supreme Court, which failed to conform with the requirements set forth in Rule 39 of the *Alabama Rules of Appellate Procedure*. After being notified of the nonconforming nature of their Petition, the Frakes seized on that opportunity to rewrite and improperly supplement the arguments contained therein. For this reason, the Alabama Supreme Court did not address the merits of the Frakes' petition, but rather "denied [their petition] for noncompliance with Rule 39(d)(3), Alabama Rules of Appellate Procedure." In their Petition, the Frakes acknowledged, "the Alabama Supreme Court's dismissal of the appeal [was] based on alleged inadequacies in the state certiorari petition." (Pet. at 4) In a subsequent provision, the Frakes admitted that "the Alabama Supreme Court . . . rather than consider the merits of the appeal, [but] dismissed [their state petition]

on the basis that the petition was non-conforming . . . " (Pet. at 12)

The Alabama Supreme Court did not issue an opinion on the merits of this action, and affirmation of the Alabama Court of Civil Appeals' decision by the Alabama Supreme Court on a procedural basis does not substitute for one. As the Alabama Supreme Court has noted, "[n]oncompliance with Rule 39(k) [of the *Alabama Rules of Appellate Procedure*] prevents review by [the Alabama Supreme] Court where the intermediate appellate court has passed judgment with no opinion." *Ex parte Jackson*, 551 So.2d 304 (Ala. 1989) (relying upon *Ex parte Save our Streams, Inc.*, 541 So.2d 549 (Ala. 1989)). In the case of *Ex parte Hoffman*, the Alabama Supreme Court concluded that, because the petitioner's petition for writ of certiorari "fail[ed] to comply with the requirement of Rule 39(k), . . . this Court [had] no alternative but to deny [the] petition." 493 So.2d 387 (1986). In denying the petition for writ of certiorari in *Hoffman*, the Alabama Supreme Court instructed that its denial of the petition should not be construed "to suggest that petitioner would have won on the merits of his claim had he complied with the rule, only that this Court will not review the merits of his claim because of his failure to comply with the requirements of this Court's rules." *Id.* at 387. As indicated by these decisions, the Alabama Supreme Court's denial of the Frakes' petition was not intended and should not be construed as a decision on the merits of the underlying action.

Rule 10, as adopted by this Court, enumerates certain categories of decisions which may trigger "for compelling reasons" this Court's certiorari jurisdiction. The two primary categories at issue in this action are (1) decisions

by "a state court of last resort" which decided an important federal question that conflicts with a prior decision of another such state court, a federal court of appeals or this Court or, (2) a decision that constitutes an issue of first impression regarding federal law. Though this Rule is not a mandatory listing of all circumstances warranting the exercise of this Court's certiorari jurisdiction, 28 U.S.C. § 1257 provides the statutory basis for this Court's jurisdiction over final judgments and/or decrees entered by the highest court of a state. Section 1257 reiterates the types of claims identified in Rule 10 which are subject to certiorari review. Throughout the past, this Court has offered guidance in the application of these standards for its certiorari jurisdiction.

As this Court wrote in *Braxton v. United States*, 500 U.S. 344, 347, 111 S.Ct. 1854, 1857, 114 L.Ed.2d 385 (1991), "[a] principle purpose for which we use our certiorari jurisdiction ... is to resolve conflicts among the United States Court of Appeals and state courts concerning the meaning of provisions of federal law." Pure common sense leads to the conclusion that, in order for a "conflict" to arise for purposes of certiorari, a state court must address some aspect of federal law. Accordingly, a decision by a state court which rests upon valid state law grounds cannot serve as the basis for certiorari review by this Court. *See e.g. Lee v. Kemna*, 534 U.S. 362, 375, 122 S.Ct. 877, 151 L.Ed.2d 820 (2002) (citations omitted) (instructing, "[t]his Court will not take up a question of federal law presented in a case if a decision of the state court rests on a state law ground that is *independent* of the federal question and *adequate* to support the judgment ... [and this] rule applies with equal force whether the state-law ground is substantive or procedural"); *Fox Film*

Corp. v. Muller, 296 U.S. 207, 210, 56 S.Ct. 183, 80 L.Ed. 158 (1935) (concluding, "where the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, our jurisdiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment); *see also Chapman v. Crane*, 123 U.S. 540, 548, 8 S.Ct. 211, 215, 31 L.Ed. 235 (1887). In light of the venue issues raised by the Frakes in their Petition, it is also worthy of noting that this Court has previously recognized the independence of state courts to dictate their own venue considerations. *See Burlington Northern Railroad Co. v. Ford*, 504 U.S. 648, 651, 112 S.Ct. 2184, 2186, 119 L.Ed.2d 432 (1992) (writing, "[t]he forum preferable to one party may be undesirable to another, and the adjustment of such warring interest is a valid state concern").

This Court has held on numerous occasions that the refusal of a highest court of a state to address certain issues on appeal does not provide a sufficient basis for this Court to review an alleged conflict with federal law not raised and/or addressed before the state courts. *See e.g. Yee v. City of Escondido, California*, 503 U.S. 519, 533, 112 S.Ct. 1522, 1531, 118 L.Ed.2d 150 (1992). This Court has previously refused to engage in a certiorari review of a decision rendered by a state court because of the failure of a petitioner to properly present his or her claim to the state court. In the case of *Hammerstein v. Superior Court of California*, 341 U.S. 491, 491, 71 S.Ct. 820, 821, 95 L.Ed. 1135 (1951), this Court wrote that it possessed "no jurisdiction to review the proceedings" before the Superior Court of California due to the petitioner's "failure to utilize the proper channel of review, namely, his failure to appeal from the default judgment." Thus, a party's failure to

comply with the specific procedural requirements before a state court necessary to the adjudication of the alleged issue of federal law precludes certiorari review by this Court.

The Frakes' failure to comply with Rule 39(d)(3) of the *Alabama Rules of Appellate Procedure* is undisputed. This failure precluded the Alabama Supreme Court from addressing the merits of the Frakes' arguments on appeal. Absent such a decision on the merits, the Alabama Supreme Court's decision cannot conflict with existing federal law and, therefore, cannot serve as the basis for certiorari jurisdiction. To grant certiorari in the present instance would excuse noncompliance with the procedural rules of the state appellate courts and assume a "conflicting" federal basis for action, when none in fact exists. In the past, this Court has indicated its hesitancy to render a decision which effectively "undercut[s] the state's ability to enforce its procedural rules." *Engle v. Isaac*, 456 U.S. 107, 129, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). Based upon the foregoing, the Frakes' Petition for Writ of Certiorari is due to be denied. Despite the fact that this Court does not possess certiorari jurisdiction in this case, Respondents will provide a full response to all of the issues raised in the Frakes' Petition.

II. Virginia courts could have constitutionally exercised personal jurisdiction over the parties to this action.

On five (5) separate occasions, the Frakes argue in their Petition that Virginia cannot "constitutionally" exercise jurisdiction over four of the six parties in this action. Much like other aspects of their Petition, the Frakes did not provide any legal authority for this

argument. Notably, the Frakes never identified which four parties they are referring to or the basis upon which the claims asserted by or against these four parties were dismissed. The claims asserted by Teresa Frakes[5] and the claims asserted against Grimaud Enterprises, Grimaud and Garies were dismissed *without prejudice* on the basis of *forum non conveniens*.[6]

Alabama's statutory *forum non conveniens* provision, *Ala. Code* § 6-5-430 (1975) expressly authorizes dismissal on the basis of *forum non conveniens* when it is "continued upon the . . . defendants . . . consent[ing] to jurisdiction in the identified forum." Pursuant to this provision, the dismissal of these claims was expressly conditioned upon Grimaud Enterprises, Grimaud and Garies consenting to jurisdiction in Virginia for a period of one hundred twenty (120) days from the date of dismissal.

Petitioners completely confuse and mischaracterize the jurisdiction issues in this case. They make arguments

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[5] Though the Frakes allege in their Petition that "Mrs. Frakes had never set foot in Virginia, much less signed the agreement containing the forum selection clause," she asserted a claim for breach of contract based upon the Franchise Agreement which contains the mandatory venue and jurisdictional provisions against the Respondents in the underlying action. In effect, Teresa Frakes is now attempting to distance herself from the Franchise Agreement and the enforceable forum selection clause. Had the trial court enforced the forum selection clause against Teresa Frakes, such a result would have been consistent with her claim for breach of contract based upon the Franchise Agreement.

[6] Petitioners do not directly challenge the trial court's *forum non conveniens* ruling (the words *forum non conveniens* do not even appear in their Petition). Rather, they argue incorrectly that no jurisdiction can be obtained in Virginia over these defendants.

and cite cases which are designed to protect defendants who are forced to defend, against their will, in a forum with which neither they nor the basic issues of the case have minimal contacts. To the contrary, in this case, all defendants have expressly consented after the dispute arose to *in personam* jurisdiction in Virginia, the place of incorporation and principal place of business of Precision Tune. Further, it was to Virginia that Mr. Frakes voluntarily traveled to execute the contract, and receive the "representations" upon which *both* Mr. and Mrs. Frakes base claims.

The vast weight of legal authority demonstrates that parties can consent to personal jurisdiction in state court. In the case of *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 102 S.Ct. 2099, 2105, 72 L.Ed.2d 492 (1982), this Court recognized that, though a court could not obtain subject matter jurisdiction by consent of the parties, the parties could consent to personal jurisdiction in a given court. Specifically, this Court wrote, "[b]ecause the requirement of personal jurisdiction represents, first of all, an individual right, it can, like other rights, be waived. *Id.* at 703, 102 S.Ct. at 2105, 72 L.Ed.2d 492. Based upon *Insurance Corp. of Ireland*, Mrs. Frakes, Grimaud Enterprises, Grimaud and Garies can "constitutionally" consent to personal jurisdiction in Virginia.

Courts in both Alabama and Virginia have also recognized that a litigant may consent to personal jurisdiction in a particular venue. *See e.g. Foster v. Foster*, 709 So.2d 1301 (Ala. Civ. App. 1998); *Victore Insurance Co. v. Ross Neely Systems, Inc.*, 757 So. 2d 473 (Ala. Civ. App. 2000) ("Personal jurisdiction can be intentionally waived."); Rule 12, *Alabama Rules of Civil Procedure*; *Lee v. Lee*, 2002 WL

1902629 (Va. App. 2002); *Mahoney v. Mahoney*, 2001 WL 213999 (Va. App. 2001); *Dials v. Lee's Hill Partnership*, 1996 WL 1065662 (Cir. Ct. of Spotsylvania County, Va. 1996). As one commentator on Virginia civil procedure recently wrote, the exercise of *in personam* jurisdiction by Virginia courts may exist or occur by a defendant's "voluntary appearance in court submitting to the court's jurisdiction." *Bryson on Virginia Civil Procedure*, § III-B-1 (2001). Likewise, Mrs. Frakes may submit to such jurisdiction by asserting her claims there.

The central authority which the Frakes allegedly rely upon in arguing that a Virginia court did not possess personal jurisdiction over Mrs. Frakes, Grimaud Enterprises, Garies and Grimaud is the case of *Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 283 (1958). Notably, the *Hanson* decision was rendered over a decade prior to this Court first recognizing the enforceability of out-bound forum selection clauses. In *Hanson*, this Court reversed the decision of the Florida Supreme Court in which the Florida court determined that it possessed jurisdiction over the claims in question. *Id.* In reversing the Florida Supreme Court's decision, this Court's analysis began with the fundamental tenet of *International Shoe* that "a defendant may not be called upon to [defend against claims in a foreign tribunal] . . . unless he has the 'minimal contacts' with that State that are prerequisite to its exercise of power over him. *Id.* at 251 (citations omitted). It is this very principle which the Frakes contend was violated by the alleged decision of the Alabama Supreme Court.

The issue with regard to the exercise of personal jurisdiction by a Virginia court in this case is not "minimum contacts," but consent as discussed above. The

consent of Defendants and the Frakes to personal jurisdiction in Virginia is not constitutionally offensive and does not violate this doctrine. As to Teresa Frakes, she wishes to convince this Court to treat her as a defendant when, in fact, the trial court and the Alabama Court of Civil Appeals determined that Mrs. Frakes' claims should, as a matter of convenience and judicial economy, be tried along with the claims of her husband, which allegedly arose out of the same alleged facts and circumstances. Accordingly, *Hanson*'s mandate with regard to minimum contacts has no application in the present case.

The convenience of Virginia as the forum for this action only arose when the trial court enforced the valid and enforceable forum selection clause and instructed Mr. Frakes that his claims must be pursued in Virginia. The doctrine of *forum non conveniens* was implemented to prevent a situation where, upon the enforcement of the forum selection clause, Mr. Frakes' claims proceed in Virginia while Mrs. Frakes' claims, which are based upon the same alleged facts and circumstances, continue in Alabama. To apply in this manner the *forum non conveniens* doctrine would ultimately result in negation of the doctrine of *forum non conveniens*, forcing two separate jurisdictions to bear the costs of administering almost identical actions. This result is clearly unacceptable. Based upon the foregoing, the trial court properly exercised its discretion and dismissed the claims asserted by the Frakes against Grimaud Enterprises, Grimaud and Garies pursuant to the doctrine of *forum non conveniens*.

III. The enforcement of the forum selection clause set forth in the Franchise Agreement complied with this Court's decision in *M/S Bremen*.

In June of 1972, this Court released its opinion in *M/S Bremen v. Zapata Off-Shore Co.*, in which this Court for the first time recognized the enforceability of outbound forum selection clauses. 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972). In reaching this landmark decision, this Court reasoned, "[t]he choice of . . . forum was made in an arms-length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts." *Id.* at 13, 92 S.Ct. at 914. Recognizing the importance of this decision, the Alabama Supreme Court relied upon *M/S Bremen* in validating forum selection clauses for the first time, incorporating this Court's instructions that "forum selection clauses 'are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be "unreasonable" under the circumstances.'" *Professional Ins. Corp. v. Sutherland*, 700 So.2d 347, 350 (Ala. 1997).[7] The Alabama Supreme Court also instructed in a decision subsequent to *Sutherland*, that forum selection clauses will not be enforced when a party demonstrates that:

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[7] In a desperate attempt to concoct some basis for this Court to assert jurisdiction over this action, the Frakes go as far as leading this Court to believe that the cases of *Professional Insurance Corp. v. Sutherland*, 700 So.2d 347 (1997) and *Ex parte CTB, Inc.*, 782 So.2d 188 (2000) recognize that "forum selection clauses were *per se* enforceable." At no point has the Alabama Supreme Court ever held that such clauses were "per se" enforceable.

> either (1) the enforcement of the forum selection [clause] would be unfair on the basis that the [contract was] affected by fraud, undue influence, or overweening bargaining power or (2) that enforcement would be unreasonable on the basis that the chosen . . . forum would be seriously inconvenient for the trial of the action.

Ex parte Northern Capital Resource Corp., 751 So.2d 12, 14 (Ala. 1999 (citations omitted). In *M/S Bremen*, this Court also instructed that one indicia of unreasonableness precluding enforcement of a forum selection clause is whether "enforcement would contravene a strong public policy of the forum in which suit is brought." 407 U.S. at 15, 92 S.Ct. at 1916, 32 L.Ed.2d 513. Hence, absent evidence of the foregoing, *M/S Bremen*, which the Frakes herald as the principal authority upon which they base their analysis of forum selection clauses, requires enforcement of the forum selection clause at issue in this case.

The Frakes exclude from their Petition any mention of the fact that Precision Tune was the only Respondent dismissed from the underlying lawsuit on the basis of the forum selection clause. Before the trial court, Precision Tune presented evidence demonstrating the fairness and reasonableness of the forum selection clause in question. In contrast, as the trial court specifically found, the Frakes did not present any evidence to the trial court and, therefore, did not even attempt to overcome the presumption of validity applicable to forum selection clauses as adopted in *M/S Bremen*. (Pet. App. at 7)

The Frakes concede, as they must, the existence of the forum selection clause within the Franchise Agreement, but argued to the trial court and the Court of Civil Appeals

and now to this Court that they are entitled to completely nullify this provision. Taking into account the guidance offered by this Court in *M/S Bremen* regarding the enforcement of forum selection clauses and the facts of this case, it is evident that the enforcement of the forum selection clause in the Franchise Agreement did not contravene this Court's instructions.

Mr. Frakes sought out Precision Tune, not vice versa, for the purpose of purchasing and operating a franchise. Mr. Frakes had the Franchise Agreement reviewed by his own legal counsel. Mr. Frakes journeyed to Texas and Virginia to Precision Tune's corporate headquarters to obtain information, upon which he based his claims of fraud, and, while in Virginia, executed the Franchise Agreement. In clear and unambiguous terms, the forum designated in the Franchise Agreement's forum selection clause required the Frakes to bring suit in Virginia, Precision Tune's state of incorporation and principal place of business. There is no evidence that any question was ever raised by Frakes or his legal counsel concerning the forum selection clause until Precision Tune first attempted to enforce this provision of the Franchise Agreement.

Mr. Frakes was fully capable of understanding its clear import and there was no evidence that he did not comprehend the implications and consequences of the provisions within the Franchise Agreement. Mr. Frakes represented in the Franchise Agreement that he "read and understood" the Franchise Agreement and had "ample time and opportunity to consult with advisors of [his] own choosing about the potential benefits and risks of entering into this Agreement." At no time have the Frakes maintained or presented evidence that Mr. Frakes was confused or misled to the forum selection clause. There was no

evidence presented to the trial court demonstrating that Precision Tune coerced or forced Mr. Frakes into entering into this franchisee-franchisor relationship with Precision Tune. In fact, the only evidence before the trial court demonstrates that Mr. Frakes actively pursued the establishment of this relationship, received the Franchise Agreement five (5) business days before executing the Agreement and consulted with legal counsel before executing the Agreement. This evidence negated any "allegation" that Mr. Frakes' execution of the Franchise Agreement was "affected by fraud, undue influence, or overweening bargaining power," and led the trial court to the appropriate conclusion that the presumption of validity of the forum selection clause should remain intact.

In forcing Mr. Frakes to honor the terms and conditions of his agreement with Precision Tune, the trial court also recognized that any alleged inconvenience resulting from this action proceeding in Virginia did not differ from the inconvenience of this matter proceeding in Alabama. Only one of the Respondents in this action resides in Alabama. Throughout this case, the Frakes have relied upon out-of-state counsel whose office is located in Savannah, Georgia. It is not surprising that Precision Tune's witnesses and relevant documents would be located at its headquarters in Virginia. The evidence before the trial court established that (1) a majority of the material witnesses were located outside Alabama, (2) the franchise operated by the Frakes' Precision Tune franchise was not even located in the venue in which this action was instituted, and (3) none of the alleged misrepresentations, which allegedly served as the basis for the Frakes' fraud claim, were made in Alabama. There is no evidence of difficulty on the part of the Frakes in maintaining this

action in Virginia, much less evidence that they "will for all practical purposes be deprived of [their] day in court." Therefore, neither the trial court nor the Alabama Court of Civil Appeals violated any of the principles set forth in *M/S Bremen* in enforcing the forum selection clause.

The Frakes attempt to hide behind an alleged "public policy" attendant to the Alabama DTPA, *Ala. Code* § 8-19-1 *et seq.* as a basis to keep the case in Alabama. However, the alleged acts by Respondents in this action which purportedly form the basis of the Frakes' DTPA claims did not occur in Alabama. Mr. Frakes' own testimony revealed that the alleged representations serving as predicate facts for these claims were made in Texas and Virginia, not Alabama. Though the Frakes harp on the alleged policy behind the DTPA, they do not present any legal authority for the notion that the Alabama Deceptive Trade Practices Act was intended to protect against alleged transactions and events occurring outside of Alabama. Furthermore, they present no evidence or even argument that they could not and did not waive any entitlement which they may have possessed in the past to assert a claim under the Alabama DTPA when Mr. Frakes executed the Franchise Agreement containing the forum selection clause and sued on the basis of the Franchise Agreement. This argument, like the Frakes' other arguments, is devoid of both factual and legal support.

Any contention that the dismissal of the action and initiation of the action in Virginia was unfair based upon the status of the case as of the date of its dismissal is simply untenable. First, Precision Tune sought dismissal of the pending claims on the grounds that such claims were not legally maintainable against Precision Tune. In addition to seeking dismissal, Precision Tune has

participated in several aspects of discovery in this matter. However, the discovery completed up to the present did not make dismissal of the suit unfair. Any discovery completed up to the present would have been completed in another forum if the action had been instituted in the proper forum. The discovery was conducted shortly after the case was filed and prior to (1) the change in the Alabama Supreme Court's analysis of the forum selection clauses, and (2) the extensive delay occasioned by the Frakes' out-of-state counsel's disciplinary problems. Dismissal does not deprive the Frakes of the opportunity to utilize this discovery or eliminate the benefits of this discovery. As shown through the foregoing, the only evidence pertaining to the analysis of the forum selection clause was presented by Precision Tune, which demonstrated the undisputed reasonableness and fairness of the forum selection clause.

In asserting their "public policy" argument, the Frakes wrote, "the Alabama Supreme Court also violated . . . the public policy interests of the State of Alabama, which specifically enacted the DTPA to protect Alabama citizens from the unfair deceptive trade practices of predatory out-of-state franchisors."[8] (Pet. at 2) In short, the Frakes request that this Court step into the shoes of the Alabama Supreme Court and dictate the public policy behind Alabama's DTPA. As recognized on previous

[8] The Frakes present interest in enforcing the alleged public policy behind the DTPA is somewhat disingenuous in light of the fact that they elected to pursue only their DTPA when confronted with the election of remedies provision provided in Ala. Code § 8-19-15 (1975), which is set forth in its entirety in the Appendix attached hereto.

occasions by this Court, the right of the State of Alabama to adopt legislation and dictate the public policy behind such legislation is vested *solely* in the State of Alabama. When the petitioner in *Diamond v. Charles*, 476 U.S. 54, 65, 106 S.Ct. 1697, 1705, 90 L.Ed.2d 48 (1986) sought "to compel the State to enact a code in accordance with [the petitioner's] interest," this Court responded, "the power to create and enforce a legal code, both civil and criminal is one of the quintessential functions of State," and "the State alone is entitled to create a legal code [and] defend[ ] the standards embodied in that code." (citations and quotations omitted) The Frakes' displeasure with any alleged policy statement made by the Alabama Supreme Court cannot serve as a basis for this Court's certiorari jurisdiction. First and foremost, the interpretation of state law, which does not conflict with federal law, is a matter solely within the purview of state courts. *See e.g. Lee v. Kemna*, 534 U.S. 362, 375, 122 S.Ct. 877, 151 L.Ed.2d 820 (2002). As this Court instructed in *Allen v. Wright*, 468 U.S. 737, 754, 104 S.Ct. 3315, 3326, 82 L.Ed.2d 556 (1984), "an asserted right to have the [state] Government act in accordance with [state] law is not sufficient, standing alone, to confer jurisdiction on a federal court." Accordingly, the Frakes cannot manipulate this forum to redress their alleged complaints regarding Alabama's application of the public policy behind its own legislative enactments. Based upon the foregoing, it is evident that the enforcement of the forum selection clause did not contravene the principles in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972). To the contrary, *M/S Bremen* demonstrates the propriety of the enforcement of the forum selection clause as well as the frivolity of the Frakes' argument to the contrary.

IV. This Court should not dramatically modify its decision in *M/S Bremen* and adopt a presumption that forum selection clauses are *per se* invalid.

Under cover of ostensibly heralding the cause of "victims of corporate fraud" across America, the Frakes propose an unwarranted and unprecedented, radical change in principles governing forum selection clauses. The Frakes would have this Court impose a "presumption of invalidity" on such clauses for a wide range of undefined "consumer protection cases" which would consume all franchise agreements (based upon the Frakes' proposal) and interject substantial uncertainty and spawn much, expensive litigation concerning issues which are currently settled. Petitioners' discussion of their view of the current status of consumer protection in America does nothing to warrant such a change in general, nor as it would directly affect the present case. The Frakes would have this Court ignore their knowing and voluntary execution of the Franchise Agreement in Virginia, and disregard the concepts of fairness and reasonableness inherent in the Court's present standard in favor of a "presumption of invalidity," creating an inappropriate obstacle to the enforcement of such provisions. This would have a dramatic negative impact on business in America.

In attempting to identify a legal basis for this argument, the Frakes rely, in large part, upon a decision rendered by the Supreme Court of New Jersey in *Kubis & Perszyk Associates, Inc. v. Sun Microsystems, Inc.*, 680 A.2d 616 (N.J. 1996). The Frakes' reliance upon *Kubis* is completely misplaced. The *Kubis* decision addressed the New Jersey Franchise Practices Act, N.J.S.A. 56: 10-1 to -15, which contains an express, statutory prohibition against

the enforcement of a forum selection clause set forth in a franchise agreement. 680 A.2d 616. In the present action, there is no such statutory provision in Alabama law which precluded the enforcement of forum selection clause in the Franchise Agreement. While the New Jersey Supreme Court refused to enforce the forum selection clause on the basis of a state statute, the Alabama Court of Appeals and, according to the Frakes, the Alabama Supreme Court reached a different decision, which was within the autonomous power vested in Alabama courts to interpret and apply its state law.

Based upon the Frakes' Petition, the Court might assume that the Circuit Court of Virginia had previously held (in an unreported decision) that "[a] forum selection clause [is] unenforceable when [a] defendant had no contacts with Virginia." (Pet. at 3) In fact, the Circuit Court of Virginia's decision in *Pinnacle Software Corp. v. Forms, Inc.*, 1991 WL 834966 (Va. Cir. Ct. 1991), held that the forum selection clause at issue in that case, which designated Virginia as the appropriate forum for disputes under the agreement, was not enforceable because neither of the corporate parties were incorporated or had their principal place of business in Virginia and no witnesses were located in Virginia and, thus, "there is no basis shown for the choice of Virginia as the appropriate forum." The circumstances presented in this case are clearly different. Virginia is the corporate home of Precision Tune as well as the alleged situs of the Frakes' claims in this case. The only two legal authorities citied by the Frakes, *Pinnacle Software* and *Kubis*, do not provide sufficient support for Petitioners' argument to justify this Court abandoning its decision in *M/S Bremen*. The Frakes' Petition for Writ of Certiorari is due to be denied.

V. Precision Tune, Grimaud Enterprises, Garies and Grimaud timely raised their venue-related objections.

In their Petition, the Frakes attempt to skirt the issues related directly to the forum selection clause by arguing that Respondents failed to raise the impropriety of venue in Alabama in a timely manner. (Pet. at 12) This is an argument based upon Alabama civil procedure which the Alabama courts already have rejected in this case. There is no appropriate basis at this point for further review. In Precision Tunes' Second Amended Motion to Dismiss, Precision Tune raised for the first time the defense of improper venue. Rule 12(h) of the *Alabama Rules of Civil Procedure* states, "[a] defense of . . . improper venue . . . is waived . . . (B) if it is neither made by motion under this rule nor included in a responsive pleading . . . ." In applying this requirement, the Alabama Supreme Court expressed, "a party can waive only an objection then available to him." *O'Brien Engineering Co. v. Continental Machines, Inc.*, 738 So.2d at 847 (1999) (quotations omitted); *see also Ex parte Monsanto Co.*, 2003 WL 558511, *10 (Ala. 2002).

The Frakes filed their initial Complaint in October of 1997, only three (3) months after the Alabama Supreme Court authorized the enforcement of forum selection clauses on the basis that such clauses deprive the trial court of subject matter jurisdiction. Precision Tune filed its first Motion to Dismiss on December 22, 1997. When Precision Tune submitted its Motion to Dismiss and Amended Motion to Dismiss, the decisions handed down by this Court, namely *Sutherland*, 700 So.2d 347 and *O'Brien*, 738 So.2d 884, instructed Precision Tune that the forum selection clauses deprived this Court of subject

matter jurisdiction, and did not provide a basis for the assertion of the defense of improper venue. Because Precision Tune could assert its objection on the basis of subject matter jurisdiction at any time during the pendency of the case, it was not necessary for it to have done so in its Motion to Dismiss and First Amended Motion to Dismiss. Shortly after the filing of these Motions, this action was placed on inactive status by the trial court for almost three (3) years as a result of issues related to Petitioners' prior counsel and mediation.

In July of 2000, the Alabama Supreme Court released its decision in *Ex parte CTB, Inc.*, 782 So.2d 188 (Ala. 2000). In *CTB*, the Supreme Court for the first time concluded that forum selection clauses invoke matters of venue, not jurisdiction as previously recognized. *Id.* at 190. In the *per curiam* opinion in *CTB*, the Alabama Supreme Court wrote, "Although this Court has previously held that 'outbound' forum-selection clauses providing for a trial outside Alabama are 'agreements concerning jurisdiction,' *Professional Ins. Corp. v. Sutherland,* 700 So.2d 347, 351 (Ala. 1997), we now recognize that such agreements actually 'implicate the venue of a court and not its subject-matter jurisdiction.'" *Id.* at 190. The express language of the *CTB* opinion recognized that this decision constituted the first occasion that the Supreme Court had enforced a forum selection clause and dismissed the action on the basis of improper venue.

In the first responsive pleading following the Court's holding in *Ex parte CTB*, Precision Tune asserted the defense of improper venue. Precision Tune's Second Amended Motion to Dismiss constituted the first responsive pleading filed since July 28, 2000, the date of the *Ex parte CTB* decision. In other words, Precision Tune moved

to dismiss the Frakes' claims on the basis of improper venue in the first responsive pleading filed since that objection was "available" to Precision Tune. As discussed previously, Precision Tune's Second Amended Motion to Dismiss on the basis of the forum selection clause gave rise to the remaining Respondents' argument that the claims asserted against them should be dismissed under the doctrine of *forum non conveniens*. Based upon the foregoing, the venue objections of Respondents were timely raised and properly granted by the trial court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

28 U.S.C. § 1257.

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

Ala. Code § 6-5-430 (1975).

Whenever, either by common law or the statutes of another state or of the United States, a claim, either upon contract or in tort has arisen outside this state against any person or corporation, such claim may be enforceable in the courts of this state in any county in which jurisdiction of the defendant can be legally obtained in the same manner in which jurisdiction could have been obtained if the claim had arisen in this state; provided, however, the courts of this state shall apply the doctrine of forum non conveniens in determining whether to accept or decline to take jurisdiction of an action based upon such claim originating outside this state; and provided further that, if upon motion of any defendant it is shown that there exists a more appropriate forum outside this state, taking into

account the location where the acts giving rise to the action occurred, the convenience of the parties and witnesses, and the interests of justice, the court must dismiss the action without prejudice. Such dismissal may be conditioned upon the defendant or defendants filing with the court a consent (i) to submit to jurisdiction in the identified forum, or (ii) to waive any defense based upon a statute of limitations if an action on the same cause of action is commenced in the identified forum within 60 days of the dismissal.

Ala. Code § 8-19-1 (1975).

This chapter shall be known and may be cited as the "Deceptive Trade Practices Act."

Ala. Code § 8-19-15 (1975).

(a) The civil remedies provided herein and the civil remedies available at common law, by statute or otherwise, for fraud, misrepresentation, deceit, suppression of material facts or fraudulent concealment are mutually exclusive. An election to pursue the civil remedies prescribed in this chapter shall exclude and be a surrender of all other rights and remedies available at common law, by statute or otherwise, for fraud, misrepresentation, deceit, suppression of material facts or fraudulent concealment arising out of any act, occurrence or transaction actionable under this chapter.

(b) An election to pursue any civil remedies available at common law, by statute or otherwise, for fraud, misrepresentation, deceit, suppression of material facts or fraudulent concealment arising out of any act, occurrence or

transaction actionable under this chapter shall exclude and be a surrender of all rights and remedies available under this chapter. All other remedies, penalties or actions presently provided by statute or common law or hereafter provided for in any other law or rule of procedure are cumulative with the provisions, remedies and actions in this chapter and this chapter shall not be construed to repeal or supersede any law not inconsistent herewith.

Ala. R. Civ. P. 12(h).

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Ala. R. App. P. 32(c).

(1) *Acceptance of nonconforming documents.* The clerk of the appellate court may exercise discretion to permit the filing of documents in which the violation of those portions

of these rules governing format is exceedingly minor, if, in the judgment of the clerk, recomposition of the documents would be unwarranted. The requirements of this rule governing the format of documents shall be liberally construed to do substantial justice with respect to persons proceeding pro se.

(2) *Conditional filing of documents.* Except as otherwise provided in subparagraph (c)(1), unless each copy of the document, in the judgment of the clerk, conforms to those portions of these rules governing format, the clerk may deem the document to have been conditionally filed, subject to the requirement that the party file in the office of the clerk a complete set of replacement documents that comply with these rules within 14 days of the issuance of notice by the clerk that the documents have been conditionally filed. The clerk's notice shall specify the matters requiring correction and, unless the court orders otherwise, in no event shall any replacement document add any substantive material.

(3) *Documents exceeding page limitations.* Documents exceeding the page limitations that are filed without prior approval of the court are viewed with great disfavor and, with respect to such documents, the court may impose a penalty, not to exceed five pages, thereby reducing the otherwise applicable page limitation.

(4) *Disposition of noncompliant documents.* Noncompliant documents will be held in the clerk's office pending instructions from the party filing the document as to their disposition. If no instructions are received by the time for filing replacement documents, noncompliant documents will be discarded.

(5) *Effect on time for filing by opposing party.* Unless the court orders otherwise, the time for filing of the opposing party's response runs from the date of filing of replacement documents pursuant to subparagraph (c)(2).

Ala. R. App. P. 39.

(a) **Considerations Governing Certiorari Review; Grounds.** Certiorari review is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons for the issuance of the writ.

(1) *Civil Cases and Non-Death-Penalty Criminal Cases.* In all civil cases and in all criminal cases other than cases in which the death penalty is imposed, petitions for writs of certiorari will be considered only:

(A) From decisions initially holding valid or invalid a city ordinance, a state statute, or a federal statute or treaty, or initially construing a controlling provision of the Alabama Constitution or the United States Constitution;

(B) From decisions that affect a class of constitutional, state, or county officers;

(C) From decisions where a material question requiring decision is one of first impression in Alabama;

(D) From decisions in conflict with prior decisions of the Supreme Court of the United States, the Supreme Court of Alabama, the Alabama Court of

Criminal Appeals, or the Alabama Court of Civil Appeals; provided that:

1. When (a)(1)(D) is the basis of the petition, the petition must quote that part of the opinion of the court of appeals and that part of the prior decision the petitioner alleges are in conflict; or

2. Where it is not feasible to quote that part of the opinion either because no wording in the opinion clearly shows the conflict or because no opinion was issued, the petition shall state specifically and with particularity how the decision conflicts with a prior decision; and,

(E) Where the petitioner seeks to have overruled controlling Alabama Supreme Court cases that were followed in the decision of the court of appeals.

(2) *Death-Penalty Cases.* When the Court of Criminal Appeals has affirmed a sentence imposing the death penalty, counsel who represented the appellant on the appeal to the Court of Criminal Appeals or successor counsel shall prepare and file in the Supreme Court a petition for a writ of certiorari for review of the decision of the Court of Criminal Appeals. That petition shall be governed by this rule, except that:

(A) In addition to the bases for consideration of petitions for the writ of certiorari listed in subsection (a)(1) of this

rule, a petition for a writ of certiorari will also be considered from a decision failing to recognize as prejudicial any plain error or defect in the proceeding under review whether or not the error or defect was brought to the attention of the trial court or the Court of Criminal Appeals.

(B) In addition to the requirements of subsection (d)(3) of this rule, dealing with the form of the petition, when review is sought for failing to recognize as prejudicial any plain error or defect, the petition shall contain a concise statement of the grounds, including a description of the issue and circumstances warranting plain-error review.

(C) The Supreme Court may enlarge the time for filing the petition. See Rule 2(b).

(D) The scope of review discussed in subsection (k) of this rule is modified only to the extent necessary to permit the Supreme Court to notice any plain error or defect in the proceeding under review, whether or not brought to the attention of the trial court or the Court of Criminal Appeals or set forth in the petition, and to take appropriate appellate action by reason thereof, whenever such error has or probably has adversely affected the substantial rights of the petitioner; provided, however, that nothing in this subsection shall require the Supreme Court to conduct an independent review for the purpose for

determining the existence of plain error.

(E) The provisions of this subsection (a)(2) shall be effective May 19, 2000.

(b) Review by Petition for Writ of Certiorari of Decisions of the Court of Civil Appeals.

(1) *Application for Rehearing Not Prerequisite to Certiorari Review.* The filing of an application for rehearing in the Court of Civil Appeals is not a prerequisite to review by certiorari in the Supreme Court. If an application for rehearing was filed, however, it must have complied with Rule 40(e).

(2) *Docket Fee.* Payment of the amount prescribed in Rule 35A(a)(3) is to be made to the clerk of the Supreme Court when the petition for the writ of certiorari is filed.

(3) *Time for Filing.* The petition for a writ of certiorari, with an accompanying brief, shall be filed with the clerk of the Supreme Court pursuant to Rule 25(a), within 14 days (2 weeks) after the release of the decision of the Court of Civil Appeals. If an application for rehearing has been filed with the Court of Civil Appeals, the petition for the writ of certiorari shall be filed within 14 days (2 weeks) of the decision of that court on the application for rehearing.

(c) Review by Petition for Writ of Certiorari of Decisions of the Court of Criminal Appeals.

(1) *Application for Rehearing Prerequisite to Certiorari Review.* The filing of an application for rehearing in the Court of Criminal Appeals is a

prerequisite to review by certiorari in the Supreme Court, except:

(A) In the case of a pretrial appeal by the state in a criminal case (see Rule 15.7, Alabama Rules of Criminal Procedure), or

(B) In the case of review of a decision by the Court of Criminal Appeals on an original petition for writ of mandamus where the petitioner seeks review by the Supreme Court by petition for writ of mandamus pursuant to Rule 21(e) of these Rules.

In those cases in which an application for rehearing is required, the application must comply with Rule 40(e).

(2) *Time for Filing.* The petition for the writ of certiorari, with an accompanying brief, shall be filed with the clerk of the Supreme Court pursuant to Rule 25(a), within 14 days (2 weeks) of the decision of the Court of Criminal Appeals on the application for rehearing, except that in the case of a pretrial appeal by the state in a criminal case, the petition for the writ of certiorari must be filed within 7 days (1 week) of the judgment of the Court of Criminal Appeals or within 7 days (1 week) of that court's order overruling an application for rehearing.

(d) Form and Length of Petition. The petition shall comply with the provisions of Rule 32(b)(2) governing form and shall not exceed 15 pages (except in capital cases, in which event the petition shall not exceed 20 pages), as also provided in Rule 32(b)(2). The petition shall contain:

(1) The style of the case, the name of the petitioner, the circuit court from which the cause is on appeal, and the name of the court of appeals to which the petition for certiorari is directed;

(2) The date of the decision sought to be reviewed and, if an application for rehearing was filed, the date of the order overruling the application for rehearing;

(3) A concise statement of the grounds, 39(a)(1)(A)-(E), supra, on which the petition is based – and in a death-penalty case a statement in accordance with 39(a)(2)(A) and (B) – provided that:

> (A) When subparagraph (a)(1)(D) is the ground for the petition, the petitioner must quote that part of the opinion of the court of appeals and that part of the prior decision the petitioner alleges are in conflict; or
>
> (B) Where it is not feasible to quote that part of the opinion of the court of appeals either because no wording in the opinion clearly shows the conflict or because no opinion was issued, the petition shall state specifically and with particularity how the decision conflicts with a prior decision;

(4) A copy of the opinion or the unpublished memorandum of the court of appeals, attached to the petition as an exhibit; and

(5) A statement of the facts, if a party is not satisfied with the facts stated in the opinion or the unpublished memorandum of the court of

appeals, or if the court of appeals issued a "no-opinion" decision pursuant to Rule 53. The statement of facts shall not be incorporated or adopted by reference from any other document, including the party's brief in support of the petition.

(A) Statement of facts where application for rehearing was filed with court of appeals after an opinion or an unpublished memorandum was issued. If a court of appeals issues an opinion or an unpublished memorandum containing a statement of facts and the party applying for rehearing is not satisfied with that statement, the party applying for rehearing in that court may, in the application, present to the court of appeals an additional or corrected statement of facts or the applicant's own statement of facts. If the court of appeals does not include the applicant's statement of facts in a subsequent opinion or memorandum, in order for the Supreme Court to consider those facts in addition to the facts as stated in the court of appeals' opinion or unpublished memorandum, the proposed statement of additional or corrected facts or the applicant's own statement of facts presented to the court of appeals in the application for rehearing must be copied verbatim in the statement of facts in the petition for the writ of certiorari, with references to the pertinent portions of the clerk's record and the reporter's transcript. The petition must

include a verification that this statement of facts is a verbatim copy of the statement presented to the court of appeals in the application for rehearing. If the petitioner does not present in the petition an additional or corrected statement of facts or the petitioner's own statement of facts, it will be presumed that the petitioner is satisfied with the facts as stated in the court of appeals' opinion or unpublished memorandum.

(B) Statement of facts where an application for rehearing was filed with court of appeals in a "no-opinion" decision or an opinion that does not state the facts. If a court of appeals issues a "no-opinion" affirmance pursuant to Rule 53 or issues an opinion or unpublished memorandum that does not contain a statement of facts, the applicant shall include in the application for rehearing the applicant's statement of facts. If the court of appeals does not include the applicant's statement of facts in a subsequent opinion or memorandum, a verbatim copy of the applicant's statement of facts as presented to the court of appeals must be included in the petition for the writ of certiorari, with references to the pertinent portions of the clerk's record and the reporter's transcript. The petition must include a verification that the statement of facts is a verbatim copy of the statement presented to the court of appeals in the application for rehearing.

(C) Statement of facts where no application for rehearing was filed with the Court of Civil Appeals. If the petition for a writ of certiorari seeks review of a decision of the Court of Civil Appeals and the petitioner has not filed an application for rehearing with the Court of Civil Appeals, and if the Court of Civil Appeals issues a "no-opinion" affirmance pursuant to Rule 53 or issues an opinion that does not contain a statement of facts, the petitioner shall include in the petition for the writ of certiorari the petitioner's statement of facts, with references to the pertinent portions of the clerk's record and the reporter's transcript. If the Court of Civil Appeals issues an opinion containing a statement of facts and the party petitioning for the writ of certiorari is not satisfied with that statement of facts, the petitioner may, in the petition for the writ of certiorari, present to the Supreme Court a proposed additional or corrected statement of facts or the applicant's own statement of facts, with references to the pertinent portions of the clerk's record and the reporter's transcript. If the petitioner does not present in the petition an additional or corrected statement of facts or the petitioner's own statement of facts, it will be presumed that the petitioner is satisfied with the facts as stated in the court of appeals' opinion.

(e) Number of Copies of Briefs; Filing and Service. The original and nine copies of the petition and brief shall

be filed with the clerk of the Supreme Court; one copy shall be filed with the clerk of the appropriate court of appeals; and one copy shall be served on each party to the proceeding in the court of appeals, including those parties not joining in the petition.

(f) Briefing on Petition for Writ of Certiorari.

(1) *Petitioner's Brief.* The petitioner's brief shall be in a form prescribed by Rule 32(a), and copies served and filed as prescribed by Rule 31 for the service and filing of briefs. The brief shall accompany the petition for the writ of certiorari or shall be attached thereto. The brief must contain all arguments in support of the petition that the petitioner intends to present, including those arguments the court will consider if certiorari review is granted.

(2) *Respondent's Brief.* Within 14 days (2 weeks) – or, in the case of a pretrial appeal by the state in a criminal case, within 7 days (1 week) – after the petition and brief are filed, the respondent may file an initial brief limited solely to the issue whether any of the grounds set forth in (a)(1)(A)-(E) – or, in a death-penalty case, (a)(2)(A) and (B) – authorizes the issuance of a writ. The respondent's initial brief shall be in a form prescribed in Rule 32(a).

(3) *Subsequent Briefs.* No additional briefs will be required of the petitioner, although the petitioner may file a reply brief in a form prescribed in Rule 32(a) within 14 days (2 weeks) after the respondent's brief is filed.

(g) Action on the Petition by Supreme Court if Writ Issues. If the Supreme Court, upon preliminary consideration, concludes that there is a probability of merit in

the petition and that the writ should issue, it shall be so ordered, and due notice shall be given by the clerk to the parties or their counsel and to the clerk of the appropriate court of appeals. The record and one copy of the briefs and appendices, if any, shall be transmitted to the clerk of the Supreme Court. The case shall stand for submission as herein provided.

(h) Briefing if Writ Issues.

(1) *Respondent's Brief.* If the writ should issue, the respondent may file, within 14 days (2 weeks) – or, in the case of a pretrial appeal by the state in a criminal case, within 7 days (1 week) – after the clerk has given notice that the writ has been issued, a subsequent reply brief addressed to the substantive issues presented for review on the petition for writ of certiorari. The respondent's subsequent reply brief shall be in a form prescribed in Rule 32(a).

(2) *Petitioner's Brief.* The petitioner may file a brief in response to the respondent's reply brief within 14 days (2 weeks) of the filing of the respondent's reply brief. The petitioner's brief in response to the respondent's reply brief shall be in a form prescribed in Rule 32(a). The petitioner shall not be permitted to file a brief in response to the respondent's reply brief in a pretrial appeal by the state in a criminal case.

(i) Oral Argument. There will be no oral argument on the preliminary examination of a petition for writ of certiorari. In the event the writ is issued, either party may request oral argument. The request shall be in writing made within 14 days (2 weeks) – or, in the case of a pretrial appeal by the state in a criminal case, within 7 days (1 week) – after the clerk has given notice that the writ

has issued. The request shall contain a statement of the reasons the Supreme Court should hear oral argument. A copy of the request shall be served on all parties involved in the proceeding on certiorari review.

(j) Submission. If either party requests oral argument, the clerk of the Supreme Court shall endorse that fact on the proper docket and if, after examining the criteria of Rule 34, the court determines that oral argument is necessary, the clerk shall set the case down for oral argument and notify the parties or their attorneys of record in writing that oral argument has been set. If neither party requests oral argument as herein provided, or if the Supreme Court determines that oral argument is unnecessary, the clerk of the Supreme Court shall, when briefs from all parties have been filed with the clerk as herein provided, immediately submit the case upon the record and briefs.

(k) Scope of Review. The review shall be that generally employed by certiorari and will ordinarily be limited to the facts stated in the opinion of the particular court of appeals, unless the petitioner has attempted to enlarge or modify the statement of facts as provided by Rule 39(d)(5). The scope of review includes the application of the law to the stated facts.

(l) **Rehearing.** No application for rehearing shall be received in the Supreme Court if the petition for certiorari is denied, quashed, or stricken.

(m) Review in Supreme Court of Decisions of Courts of Appeals on Petitions for Extraordinary Writs. A party aggrieved by a decision of a court of appeals on a petition for a writ of mandamus or prohibition or

other extraordinary writ is entitled to review in the Supreme Court as provided in Rule 21(e).